No. 4841

United States

Circuit Court of Appeals

For the Ninth Circuit.

PETER CHORAK,

Plaintff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
OCT 21 1926
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOHN F. DORE, Esquire,
Attorney for Plaintiff in Error, 1903 L. C. Smith Building, Seattle, Washington.

F. C. REAGAN, Esquire,
Attorney for Plaintiff in Error, 1903 L. C. Smith Building, Seattle, Washington.

THOS. P. REVELLE, Esquire,
Attorney for Defendant in Error, 310 Federal Building, Seattle, Washington.

C. T. McKINNEY, Esquire,
Attorney for Defendant in Error, 303 Federal Building, Seattle, Washington. [1*]

(Comm'r. # —— Bail $—— Wash. 2823.)

United States District Court, Western District of Washington, Northern Division.

May, 1925, Term.

No. 9697.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETE CHORAK,

Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Act of Oct. 28, 1919, National Prohibition Act.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That PETE CHORAK, on the tenth day of May, in the year of our Lord one thousand nine hundred and twenty-five, about one and one-half miles west of the city of Enumclaw, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, and unlawfully sell certain intoxicating liquor, to wit, twelve (12) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said PETE CHORAK as aforesaid, was then and there unlawful and

prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That prior to the commission by the said PETE CHORAK of the said offense of selling intoxicating liquor herein set forth and described in manner and form as aforesaid, said PETE CHORAK, on the 14th day of November, 1923, in cause No. 7971, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of selling intoxicating liquor on the 29th day of June, 1923, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That PETE CHORAK, on the tenth day of May, in the year of our Lord one thousand nine hundred and twenty-five, about one and one-half miles west of the city of Enumclaw, in the Northern Division of the Western District of Washington,

and within the jurisdiction of this court, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, one (1) ounce of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, intended then and there by the said PETE CHORAK for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said PETE CHORAK as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney. [5]

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court June 19, 1925. Ed. M. Lakin, Clerk. By P. A. Page, Deputy. [6]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA.

Now on this 3d day of August, 1925, the above defendant is called for arraignment, accompanied by his attorney F. C. Reagan, and says that his true name is Pete Chorak. Whereupon the reading is waived and he enters his plea of not guilty. Journal # 13, page 466. [7]

[Title of Court and Cause.]

TRIAL.

Now on this 16th day of September, 1925, this cause comes on for trial with both sides present. A jury is impanelled and sworn as follows: Howard N. Seeley, Mark Odell, Edgar A. Quigle, Alfred W. Love, Jacob H. Arensberg, Orin Babcock, Adolph Peterson, Charles E. Linder, Charles K. Miller, G. W. Turner, F. E. Walkley and George H. Sharon. Government makes opening statement. On motion of defendant witnesses are sworn and admonished and excluded from the courtroom except while testifying, save Agent Lambert as follows: Howard E. Carr, Otto Moses, R. A. Lambert and W. M. Whitney. Government witnesses are examined as follows: Otto Moses, I. H. Horton, and Howard E. Carr. Government exhibits numbered 1, 2, 3 and 4 are introduced as evidence.

Journal No. 13, page 513. [8]

[Title of Court and Cause.]

TRIAL RESUMED.

Now on this 17th day of September, 1925, trial in the above-entitled cause is resumed with all parties present. The following Government witnesses are examined under oath; Richard A. Lambert and S. E. Leitch are sworn by the Court. Government Exhibits Numbered 1, 2, 3 and 4 are introduced and admitted in evidence. Government rests. Jury is excused while motion for a directed verdict is argued and denied with exceptions allowed. Defendant's witnesses are examined as follows: Pete Chorak. Defendant's Exhibit "A" is introduced and admitted as evidence. Both sides rest. Said cause is argued to the jury and recess is allowed until 2 P. M. Trial is resumed and the jury, after being instructed by the Court, retires for deliberation. Thereafter returning into court at 3:42 P. M. with a verdict. Verdict is acknowledged and reads as follows: "We, the jury in the above-entitled cause, find the defendant Pete Chorak is guilty as charged in Count I of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count II of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count III of the indictment herein, Mark Odell, Foreman. Jury is excused from the cause and sentence is continued until Monday, September 21,

1925. Defendant is allowed to go on present bond.
Journal No. 13, page 514. [9]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant Pete Chorak is guilty as charged in Count I of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count II of the indictment herein; and further find the defendant Pete Chorak is guilty as charged in Count III of the indictment herein.

MARK ODELL,
Foreman.

[Endorsed]: Filed Sep. 17, 1925. [10]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, Pete Chorak, and moves the Court for an order granting him a new trial herein, on the following grounds, to wit:

1. That the verdict is contrary to law.
2. That there was not sufficient evidence to support the verdict.
3. Errors in law occurring at the trial and duly excepted to by the said defendant.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

Acceptance of service of within motion acknowledged this 21 Sept., 1925.

J. W. HOAR,
Attorney for Ptff.

[Endorsed]: Filed Sep. 21, 1925. [11]

[Title of Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL.

Now on this 28th day of September, 1925, the above cause comes on for hearing on motion for new trial which is argued and taken under advisement until 2 P. M., at which time the Court rules from the bench denying motion. Exception is noted to defendant and sentence is passed at this time.

Journal No. 13, page 529. [12]

United States of America, Western District of Washington, Northern Division.

No. 9697.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PETE CHORAK,
Defendant.

JUDGMENT AND SENTENCE.

Comes now on this 28th day of September, 1925, the said defendant Pete Chorak into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the term of fifteen months at hard labor and to pay a fine of $200 *dollars* on Counts I and II taken together and a fine of $200 *dollars* on Count III. And the said defendant is hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment & Decree No. 4, page 426. [13]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Above-entitled Court, and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant, Pete Chorak, by his attorney, John F. Dore, and respectfully shows that on the 16th day of September, 1925, a jury impanelled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty of the indictment theretofore filed in the above-entitled court and cause; and thereafter, within the time limited by law, under the rules and order of this Court, the defendant moved for a new trial, which said motion was by the Court overruled and an exception allowed; and thereafter, on the 28th day of September, 1925, said defendant was by order and judgment and sentence of the above-entitled court in said cause sentenced as follows: On Counts I and II of said indictment, to serve fifteen months in the United States Penitentiary at McNiel Island and to pay a fine of Two Hundred Dollars, and on Count III to pay a fine of Two Hundred Dollars.

And, your petitioner herein feeling himself aggrieved by said verdict and the judgment and sentence of the Court herein as aforesaid, and by the orders and rulings of said Court, and proceedings [14] in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the

Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said Court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided; and therefore, premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination said defendant be admitted to bail.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 29, 1925.

Acceptance of service of within petition acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney for Ptff. [15]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the above-named defendant, Pete Chorak, and in connection with his petition for writ of error in this cause, submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in admitting over the objection of the defendant the following testimony on re-direct examination of the witness Moses, to wit:

> "I saw Chorak the day before the sale of the whiskey was made, and the occasion of seeing him the day before was that I was buying whiskey from him."

II.

The Court erred in admitting over the objection of the defendant testimony of the witness Moses to the effect that he told the Prohibition Agents where he got the liquor on which he became drunk the day preceding the date of the sale alleged in the indictment. [16]

III.

The Court erred in admitting in evidence over

the objection of the defendant the minutes of the Court relating to former conviction.

IV.

The Court erred in allowing the reading of the indictment on which there was a prior conviction, over the objection of the defendant.

V.

The Court erred in refusing to prevent, or, if impossible to prevent, to grant the defendant's motion to instruct the jury to disregard the argument of the United States Attorney, wherein he told the jury that the Indian had testified he purchased whiskey from Chorak on the day before that alleged in the indictment, and, when the Court said that such testimony had been stricken, the district attorney persisted in stating that he demanded the right to tell the jury what the witnesses testified and then repeating the statement that the Indian got drunk on whiskey he bought from Chorak, in refusing to discountenance such argument.

VI.

The Court erred in overruling the motion for a directed verdict on Count II.

VII.

The Court erred in overruling the motion for a directed verdict on Count III.

VIII.

The Court erred in overruling the motion for a new trial.

IX.

The Court erred in giving his instructions as a

whole, for the reason that the same were argumentative and an unfair comment [17] on the evidence, to wit, that part of said instructions reading as follows:

> "If, on the other hand, you believe that the quantity that was in these bottles was simply the part that remained after the others had been disposed of—while there is no evidence here that anything of that kind occurred, yet if all the circumstances lead you to believe that the defendant was engaged in dispensing liquor there, and that these bottles had simply been used there from which the content had already been disposed of, with the exception of what was in there, and this was left over in the ordinary routine of business there, when you would have a right to conclude that the contents of these bottles were not merely dregs remaining in the bottles which had been picked up, but was simply the content that remained after the other had been taken out."

X.

The Court erred in instructing the jury as follows, to wit:

> "What was the reasonable conduct of all the parties? How did this Indian happen to go over to the place where they say the liquor was bought? What was the motive that inspired him to go there? * * * There is evidence here that the Indian was in jail at Sumner, being placed there for intoxication,

and he told the witnesses upon the part of the Government where he got the liquor that made him intoxicated. Now then, what did the parties do? Then Mr. Lambert and the other parties offered by the Government took the Indian and went up to the place of business of the defendant; they gave the Indian $5 when they left Sumner and asked him to go in. The Indian took this money—they marked it. They say they examined him; the Indian says they did not examine him; one of the other witnesses said they did not examine him. Lambert rode with him in the car from Sumner to the place of business of the defendant. He went in there and the officers saw him go in and saw him come out. He came out with a bottle of liquor and returned $3, $2 is what he testified he paid for the liquor. The defendant says he did not get any—that he bought some cigarettes for fifteen cents and gave him a $5 bill and he gave him $4.85 back in change; the Indian says he did buy cigarettes and paid him fifteen cents. The Indian, I believe it is conceded, testified, and I don't know that it is denied, had $1.40."

XI.

The Court thereafter entered judgment and sentence against said defendant upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the Court so entered judgment and sentence upon the verdict.

And as to each and every of said assignments of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly excepted [18] and was allowed an exception wherever the same appears in the record to the ruling and order of the Court.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 29, 1925.

Acceptance of service of within assignments acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney. [19]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND.

A writ of error is granted on this 29 day of September, 1925, and it is further ordered that, pending the review herein, said defendant, Pete Chorak, be admitted to bail, and the amount of the supersedeas bond to be filed by said defendant be the sum of Three Thousand Dollars.

And it is further ordered that, upon the said defendant's filing his bond in the aforesaid sum, to be approved as by law provided, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 29 day of September, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 29, 1925.

Acceptance of service of within order acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney for Ptff. [20]

[Title of Court and Cause.]

APPEAL AND BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Pate Chorak, as principal, and Peter Verhonik and Fannie Verhonik of Enumclaw, King County, Washington, and Antone Gove and Francis Gove, of Enumclaw, King County, Washington, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Three Thousand Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that, whereas the said defendant was, on the 28th day of September, 1925, sentenced in the above-entitled cause to be confined for the period of fifteen months

at United States Penitentiary and to pay a *fine Four* Hundred Dollars; and, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Three Thousand Dollars.

Now, therefore, if the said defendant, Pete Chorak, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises and shall render himself amenable to and obey all process [21] issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this

obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated, this 28th day of September, 1925.

PETE CHORAK. (Seal)
PETER VERHONIK. (Seal)
her
FANNIE X VERONIK. (Seal)
mark
~~MIKE BODGON.~~ (Seal)
~~LENA BOGDON.~~ (Seal)
ANTON GOVE. (Seal)
FRANCIS GOVE. (Seal)

Witness: F. C. REAGAN.

O. K.——————,
Assistant United States Attorney.

Approved.

——————,
Judge.

Approved as to surety Sept. 29th, 1925.

[Seal] H. S. ELLIOTT,
U. S. Commissioner. [22]

United States of America,
State of Washington,
County of King,—ss.

Peter Verhonik and Fannie Verhonik, his wife, and Mike Bodgon and Lena Bogdon, his wife, being first duly sworn, on oath, each for himself and not one for the other, says:

I am a resident of the State of Washington, over the age of twenty-one years, and not an attorney

or counsellor at law, sheriff, clerk of the Superior Court, or other officer of such court, or of any other court; that I am worth, over and above all debts and liabilities, and exclusive of property exempt from execution, in real estate situate in King County, Washington, as follows: The said Peter and Fannie Verhonik N. W.^{4} of S. W.^{4}; S. E.^{4} S. W.^{4}; and N. W.^{4} S. E.^{4} Sec. 1, Twn. 20 N. R. 6 E., W. M. assessed valuation $3,850—No encumbrances actual value $7,000—This information gained from independent sources.

The said Antone Gove and Francis Grove, Lots 1 and 2, Sec. 1, Twn. 20 N. R. 6 E., W. M., assessed valuation $1,390— No encumbrances actual value $7,000—This information gained from independent sources.

PETER VERHONIK.
FANNIE X VERHONIK.
~~MIKE BOGDON.~~
~~LENA B. BOGDON.~~
ANTONE GOVE.
FRANCIS GOVE.

Witness: F. C. REAGAN.

The erasure of the names of Mike Bogdon and wife above was necessitated by the failure of said parties to present sufficient property to justify on the bond.

H. S. ELLIOTT,
U. S. Commissioner.

Subscribed and sworn to before me, this 28*st* day of September, 1925.

[Seal] H. S. ELLIOTT,
United States Commissioner.

[Endorsed]: Filed Sep. 29, 1925. [23]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 2, 1925, FOR FILING BILL OF EXCEPTIONS.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the bill of exceptions in the above-entitled cause be and the same hereby is extended to and including the 2d day of November, 1925.

Done in open court this 30 day of Oct. 1925.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Attorney.

Endorsed: Filed Oct. 29, 1925. [24]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 30, 1925, FOR FILING RECORD.

For good cause shown, IT IS HEREBY ORDERED that the time for filing the record in the

above-entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 30 day of Nov., 1925.

Done in open court, this 30 day of Oct., 1925.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

[Endorsed]: Filed Oct. 29, 1925. [25]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 12, 1925, TO FILE RECORD AND DOCKET CAUSE.

It appearing to the Court that the transcript of the record in the above-entitled cause is due in the Circuit Court of Appeals at San Francisco, California, on November 30, 1925, and it further appearing that the bill of exceptions in the above-entitled cause has not been settled or allowed,

NOW, THEREFORE, IT IS ORDERED that the time for filing the record in this cause be, and it hereby is, extended to and including the 12th day of December, 1925.

Done in open court this 23d day of November, 1925.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Nov. 23, 1925. [26]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 16th day of September, 1925, at the hour of 10:00 o'clock A. M., the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable Jeremiah Neterer, Judge thereof, the plaintiff appearing in person and by John F. Dore, his counsel, and the defendant appearing by Thomas P. Revelle and J. W. Hoar, United States Attorney, and Assistant United States Attorney.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

TESTIMONY OF OTTO MOSES, FOR THE GOVERNMENT.

OTTO MOSES, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I live at Snoqualmie, Washington. I am acquainted with Pete Chorak, who runs a gas station on the highway between Auburn and Enumclaw, and was in his place of business on May 10th, 1925, and went there with Mr. Lambert in my Ford car. There was another car behind us but I did not know who was in it. Mr. Lambert did

(Testimony of Otto Moses.)

not examine me for liquor before I went into the gas station. He gave me a five dollar [27] bill and I went in and bought a pint of moonshine, paying two dollars for it. He gave me three dollars back, together with the liquor which I gave to Lambert. I did not have any liquor when I went in. The agent searched the place afterwards.

Cross-examination.

I do not know the day of the week or the month; it was about four months ago. I never saw Lambert before—I am an Indian. I live at Snoqualmie which is about 40 miles from Enumclaw. I first met Lambert that day in the jail at Sumner, which is near Tacoma. I was locked up in jail for being drunk. Lambert came to the jail and took me out in the afternoon and told me that if I would go and get liquor they would free me. I took my car and drove Lambert to a point about 100 feet past the gas station and Lambert remained in the car. The other men stayed in the other car about 100 yards past the gas station. The five dollars was given to me at Sumner and I had a few dollars of my own in addition. They did not search me in the jail and Lambert did not search me after he got me out of jail. I went into the gas station and bought a package of cigarettes for which Pete charged me fifteen cents. I work in a logging-camp at Snoqualmie. I drove from Snoqualmie to Sumner the night before. After I got the bottle they told me to go home.

(Testimony of Otto Moses.)

Redirect Examination.

I saw Pete Chorak the day before.

Q. What was the occasion of seeing him at that time?

Mr. DORE.—I object as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Q. What happened when you were down there the day before?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial. [28]

The COURT.—Overruled.

Mr. DORE.—Desire an exception.

The COURT.—Note it.

A. Buying whiskey.

Mr. DORE.—Ask to have that stricken and the jury instructed to disregard it; it is not alleged in the indictment.

The COURT.—Proceed.

Mr. DORE.—I made an objection, and move it be stricken and the jury instructed to disregard it.

The COURT.—Let it stand for the present.

Mr. DORE.—I desire an exception.

The COURT.—Let it stand for the present.

Mr. DORE.—Will you note an exception.

The COURT.—Yes.

Q. You testified on cross-examination,—

Mr. DORE.—Do I understand by that I am to renew this; is this motion denied, or is the Court reserving its decision?

(Testimony of Otto Moses.)

The COURT.—I said it may stand; that means it may stand for the present.

Mr. DORE.—Note an exception.

Q. I will ask you if the liquor you got drunk on was the liquor you purchased from Mr. Chorak the day before?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. DORE.—Ask that the jury be instructed to disregard any inference, —

Mr. HOAR.—Counsel seeks to show he was drunk,—[29]

The COURT.—The jury will disregard the answer about the liquor he got the day before on which he got drunk.

Q. Did you tell the agents where you got the liquor upon which you became drunk.

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial, and hearsay.

The COURT.—He may answer whether he did, or not.

Q. (By the COURT.)—Did you, or didn't you?

Mr. DORE.—Desire an exception.

Q. (By Mr. HOAR.)—Did you tell him where you got the whiskey?

Mr. DORE.—Desire an exception.

A. Yes, sir, I did.

Mr. DORE.—Is the exception noted?

The COURT.—Yes, note an exception.

TESTIMONY OF I. H. HORTON, FOR THE GOVERNMENT.

I. H. HORTON, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am the City Marshal of Sumner. I saw the defendant at his gas station on the 10th of May, 1925. Ballinger, Lambert and Carr were with me together with Moses. I first saw Moses about five o'clock in the morning at Sumner asleep in his car. Moses went into the gas station and came out with a bottle of moonshine whiskey. Prior to the time D. Moses went in he had been given a five dollar bill, which was found in the till. Government's Exhibit No. 1 is the five dollar bill found in the till. Afterwards the agents searched the place and the defendant was arrested.

Cross-examination.

The five dollar bill was given to the Indian at Sumner. He drove his own car up to the gas station with Lambert. [30] The five dollar bill was given to him by Lambert. Nobody searched him. He drove 100 yards past the gas station. Moses was in the gas station probably 15 minutes. I saw him go into the gas station and come out. The Indian was not searched when he came out.

Redirect Examination.

There were some small glasses and empty bottles

(Testimony of I. H. Horton.)
found behind the counter in the defendant's place of business.

Recross-examination.

Mr. Lambert took the bottles along.

TESTIMONY OF HOWARD E. CARR, FOR THE GOVERNMENT.

HOWARD E. CARR, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a carpenter's helper by trade and on the 10th of May, 1925, I was driving for the federal prohibition agents in Tacoma. On May 10th, 1925, I visited the gas station of the defendant. I saw Moses go in the premises and come out with a pint of moonshine whiskey. Government's Exhibit No. 1 is the bottle that Moses gave Lambert when he came out of the gas station. I assisted in searching the gas station and behind the soft-drink bar some empty bottles were found out of which we procured an ounce of moonshine whiskey. Government's Exhibit No. 2 is the liquor that was obtained by draining the bottles from behind the counter. Government's Exhibit No. 3 is the glasses found on the bar when we went in. Government's Exhibit No. 4 is the five-dollar bill that was found in the till.

(Testimony of Howard E. Carr.)

Cross-examination.

The Indian gave the change to Lambert. He had $1.40 when he was searched in Sumner. Horton, Ballinger, Lambert and myself were present when he was searched. I saw the Indian come out of the [31] gas station with a bottle in his pocket and hand it to Lambert. Back of the gas station was a store where candy, tobacco and soft-drinks were sold. We found four or five flasks and emptied the contents into a bottle.

TESTIMONY OF RICHARD A. LAMBERT, FOR THE GOVERNMENT.

RICHARD A. LAMBERT, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Agent. I know the defendant who operates a gas station near Enumclaw. I visited the gas station on the 10th of May, 1925, in company with Roy Bollinger, Marshal I. H. Horton, Howard Carr and Otto Moses. I stopped the car about 40 feet west of the gas station and across the road from the gas station. Before we left Sumner I searched Moses. He did not have any liquor, he had $1.75 and spent 35¢ for oil for his Ford car, that left him $1.40. When I arrived at the gas station I gave Moses a five-dollar bill and Moses went into the gas station. The de-

(Testimony of Richard A. Lambert.)

fendant went out the back door and into the woods and came back with a bottle in his left-hand pants pocket and soon after Moses came out and over to the Ford car where I was sitting and handed me $3 in change and also took from his pocket the pint of moonshine, then I sent him home. We then searched the gas station which had in connection with it a soft-drink bar behind which we found several pint flasks and in each flask was a small amount of moonshine whiskey. The six pint flasks we drained into one pint flask. Behind the bar were several glasses. The five-dollar bill was found in the cash register. In making a search of the direction where the defendant went into the woods, we found no whiskey. Government's Exhibits Nos. 1 and 2 is the whiskey that was drained from the six flasks and the bottle the Indian brought out to the car. Government's Exhibit No. 3 is the glasses found behind the bar and Government's [32] Exhibit No. 4 is the five-dollar bill.

Cross-examination.

I searched the Indian at Sumner and he had $1.75 on him. We found no liquor on the premises except the dregs out of these empty bottles.

TESTIMONY OF C. W. KLINE, FOR THE GOVERNMENT.

C. W. KLINE, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

Admitted that the contents of the bottles contained more than one-half of one per cent of alcohol by volume, and fit for beverage purposes.

TESTIMONY OF SAMUEL E. LEITCH, FOR THE GOVERNMENT.

SAMUEL E. LEITCH, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am the Deputy Clerk of the District Court for the Western District of Washington, Northern Division and have charge of the records of this court and have the original sentence and judgment in cause No. 7971 as to Pete Chorak.

Q. Will you read that judgment.

A. (Reading:) "United States of America, Plaintiff, vs. Pete Chorak, Defendant, No. 7971. Sentence. Comes now on this 15th day of November, 1923, the defendant, Pete Chorak, into open court for sentence, and being informed by the Court of the charges herein against him, and of his conviction of record herein, he is asked whether he has

(Testimony of Samuel E. Leitch.)

any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. [33]

WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act, and that he be punished by being confined in the King County jail, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for a period of four months, and the defendant, Pete Chorak, is now hereby remanded into the custody of the United States Marshal to carry this sentence into execution."

Q. That sentence does not seem to show the count upon which he was convicted.

Mr. DORE.—You can't correct a judgment by going back to a verdict.

The COURT.—Let him answer.

A. The verdict does not seem to be in this file just now.

The COURT.—Well, we ought to have it.

Q. Can you secure the balance of the records here. We have charged a prior conviction and sale; there is one conviction and sale charged.

A. I can determine that from the minute entry.

Q. Will you secure that minute entry.

A. I don't know how long it will take to get this verdict.

Mr. DORE.—I will make an objection on the

(Testimony of Samuel E. Leitch.)

ground you can't amplify a judgment or correct it or explain it; it is a final judgment.

The COURT.—Overruled.

Mr. DORE.—Note an exception.

Q. Will you please secure that. [34]

A. The defendant *pleaded in* that case, there was no trial; the docket entry shows an arraignment and plea.

Mr. DORE.—I still have an objection running to this, and an exception noted.

Q. Have you an appearance docket of this court?

A. I have.

Q. How is that docket kept? From what are those notations made.

Mr. DORE.—I object as incompetent, irrelevant and immaterial.

The COURT.—Proceed.

Mr. DORE.—Note an exception.

A. By filing an information or indictment the case is docketed, and the names of the defendants entered in this docket.

Q. (By the COURT.) What is that, the appearance docket?

A. The appearance docket.

Mr. DORE.—Made by the Clerk. I want an exception to this.

The COURT.—Objection sustained; that don't help us any.

(By Mr. HOAR.)

Q. Will you read the indictment in that cause to the jury.

(Testimony of Samuel E. Leitch.)

Mr. DORE.—I object as incompetent, irrelevant and immaterial; an attempt to inject matters not within the issue, and matters that are prejudicial under the condition of the record; incompetent at this time.

The COURT.—Objection sustained. The information charges possession and sale and manufacture, etc., and the Government has not designated any particular count.

Mr. HOAR.—It says sale; the sentence does not indicate the count. [35]

Mr. HOAR.—The Government is taken by surprise in this matter. I ask that the case be continued until this afternoon to give the Government a chance to produce those records.

The COURT.—Denied; no surprise. The records have always been here; you should have checked it up before.

Mr. HOAR.—I am making a demand now that the Clerk produce the minute entries entered upon the 15th day of November, 1923, showing what transpired in the case of United States vs. Pete Chorak.

Q. (By the COURT.) Can you get it?

A. Your Honor, as I stated before, I have the clerks looking for it, that is the best I can do at this time.

The COURT.—I am informed the journal is at the bindery at the direction of the Attorney-General. We will take a recess for fifteen minutes.

(After recess.)

(Testimony of Samuel E. Leitch.)

Q. (By Mr. HOAR.) Have you the minute entries made by the Clerk of the District Court of the Western District of Washington, Northern Division, on the 15th day of November, 1923?

A. I have the clerk's entry on the court journal made from the minute entry, made by the Clerk in the courtroom.

Q. In the case of the United States vs. Pete Chorak, No. 7971, will you read the journal entry?

Mr. DORE.—I object as incompetent, irrelevant and immaterial; not a proper way to plead it; it would not make any odds what the other entry shows, or what the man did, as it was,—

The COURT.—Read the record. Overruled.

Mr. DORE.—Note an exception. And also as being too broad and [36] containing matters extraneous to the case and prejudicial.

The COURT.—Proceed.

Mr. DORE.—Note an exception.

A. (Reading:) "United States of America, Plaintiff, vs. Pete Chorak and John Prkut, Defendants, No. 7971. Arraingment and Plea. Now on this 15th day of November, 1923, the above-named defendants came into open court for arraignment. Both defendants waive the presence and appointment of an attorney, and say that their true names are Pete Chorak and John Prkut. Whereupon the information is explained by the Court, and each defendant enters his plea of guilty. Upon motion of the U. S. Attorney Counts I, II and IV are dismissed, and sentence is passed at this time."

(Testimony of Samuel E. Leitch.)

Q. (By the COURT.) Which one of the counts?

A. It does not say, just eliminates Counts I, II and IV and dismissed them, leaving Count III.

Q. (By Mr. HOAR.) Handing you the original information in cause No. 7971, United States District Court for the Western District of Washington, Northern Division, I will ask you, Mr. Leitch, to read Count III thereof.

Mr. DORE.—I object as incompetent, irrelevant and immaterial; not the proper way to prove it.

The COURT.—Overruled.

Mr. DORE.—Note an exception.

A. (Reading.) "Count III: On the 29th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-three near the Town of Enumclaw, in King County, within the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Pete Chorak and John Prkut, then and there being, did then and there knowingly, wilfully and unlawfully sell certain intoxicating [37] liquor, to wit, fifty (50) gallons of certain liquor known as distilled spirits, and ten (10) gallons of a certain liquor known as wine, then and there containing more than one-half of one per centum of alcohol by volume, and fit for use for beverage purposes, a more particular description of the kind and amount being to the United States Attorney unknown, and which said sale by the said Pete Chorak and John Prkut, as aforesaid, being then and there unlawful and prohibited by the Act of Congress passed Oc-

(Testimony of Samuel E. Leitch.)
tober 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

TESTIMONY OF W. M. WHITNEY, FOR THE GOVERNMENT.

W. M. WHITNEY, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Legal Advisor. The defendant is the same Pete Chorak who is named in cause No. 7971, United States vs. Pete Chorak.

Government rests.

The defendant challenges the sufficiency of the evidence to sustain a verdict and moves for a directed verdict on counts II and III. The motion is denied. Exception allowed.

TESTIMONY OF PETE CHORAK, IN HIS OWN BEHALF.

PETE CHORAK, the defendant, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

I owned the gas station between Enumclaw and Auburn about four days when I was arrested. It consists of a gas station right in front of the store, and a store about 25x30. There is two acres of

(Testimony of Pete Chorak.)

[38] land in the piece. The Indian came into the store on May 10th, 1925, and wanted a package of cigarettes which I gave him, he gave me a five dollar bill and I gave him $4.85 in change. He asked me where the lavatory was and I told him to go right through the back room out into the woods. He went back into the woods and I did not see him again until after I was arrested. I was arrested after serving a couple of cars with gas and oil about 15 or 20 minutes. The empty bottles found under the counter were bottles I had picked up on the grounds where people had been camping and I figured to sell them to the junk man. I get a dollar a case for pop bottles. All they found were the dregs from these six flasks.

Cross-examination.

There was a bunch of bottles by the counter, I do not know how many that I had picked up around the place. Prior to the 6th of May, 1925, I was working in a mine for the Black Carbon Coal Company at Morristown, Washington. I had nothing to do with this gas station prior to May 6th, 1925. I bought it from John Prkut and A. W. Davies. I never saw Moses before the day in question. I did not see him the day before. When he came into the gas station he asked for a package of cigarettes. Between the time that Moses was there and the time that I was arrested I served a couple of cars with gas and oil. Moses asked me where the lavatory was and I told him and he went back there. Lam-

(Testimony of Pete Chorak.)
bert came in and said he was a Federal Officer and asked about the five-dollar bill. I said an Indian comes in and wants a package of cigarettes, I gave it to him and gave him the change and said, "You are welcome."

During the argument of the Assistant United States Attorney the following occurred:

Mr. DORE.—I object to that; there is no testimony [39] that anybody was a Custom's Inspector in this case.

The COURT.—Confine yourself to the testimony.

Mr. HOAR.—(Resuming argument:) * * * The Marshal searched him in the jail and he had nothing on him.

Mr. DORE.—I object to that as not within the evidence: no such testimony as that is in the case.

The COURT.—Confine yourself to the testimony in the case.

Mr. HOAR.—The Marshal did so testify; I object to counsel interrupting on such frivolous matters as that. * * *

> "You recall the Indian told you yesterday that he had purchased whiskey from Mr. Chorak on the day before.

Mr. DORE.—I object to that and ask that the jury be instructed to disregard it. That was the testimony that was stricken out by the Court, and it is prejudicial; and I ask that the jury be instructed to disregard it.

The COURT.—The jury will disregard it.

Mr. HOAR.—I demand the right to state what the witnesses testified to.

The COURT.—Proceed with your argument.

Mr. HOAR.— * * * "He told you he had been there the day before,—

Mr. DORE.—Same objection. I have the record here. I ask that the jury be instructed to disregard that. [40]

Mr. HOAR.— * * * "That he got drunk on whiskey he bought from Chorak. He said he purchased whiskey from Chorak."

Mr. DORE.—I ask that the jury be instructed to disregard that remark.

Mr. HOAR.—I will not press it; it is there.

Mr. DORE.—I object to that remark, and ask that the jury be instructed to disregard it as improper argument.

The COURT.—Proceed with the argument.

Mr. DORE.—He said he would not press it, but it is there; that is improper argument.

The COURT.—Proceed.

(Opening argument concluded. Argument by Mr. DORE.)

(The following occurred during the closing argument:)

Mr. HOAR.— * * * "The Marshal told you that the Indian had a bottle with a small amount of liquor in the morning,—

Mr. DORE.—No such testimony in the case; I ask that the jury be instructed to disregard it.

The COURT.—Oh, Mr. Dore.

Mr. DORE.—I am making a record here; I want to note my exception to this improper argument.

The COURT.—Proceed.

Mr. DORE.—Note an exception. [41]

At the conclusion of the argument by respective counsel, the Court gave the jury the following oral.

INSTRUCTIONS OF THE COURT TO THE JURY.

Gentlemen of the Jury:

The defendant in this case is charged by this indictment in three counts: Count III charges him with having possession of one ounce of liquor known as distilled spirits. Count I charges him with the sale of twelve ounces of distilled spirits. The distilled spirits referred to in each count it is charged, contains an alcoholic content in excess of one-half of one per cent of alcohol by volume, and fit for beverage purposes. Count II charges the defendant with having been prior convicted of the sale of intoxicating liquor on the 29th [42] day of November, 1923. Count II is a part of Count I, and it is merely subdivided. The defendant cannot be found guilty of Count II unless he is found guilty of Count I, because if he is not guilty of Count I of the sale as charged, then Count II would be inoperative, because there is nothing upon which to predicate it. Count II is simply placed in the indictment because of the provision of the law which fixes the penalty for a sale of intoxicating liquor greater upon a second conviction than it is upon the first offense, and it makes it incumbent upon the United States Attorney to present to the

Grand Jury, if an indictment is returned, the fact that there was a former conviction, so that the Court then will fix a penalty in the manner which is regulated by this Act.

Now the defendant has pleaded not guilty to all of these counts in the indictment, and he is presumed innocent until he is proven guilty beyond every reasonable doubt.

You are instructed that it is against the law for a person to sell or to have in his possession intoxicating liquor as charged in this indictment. And you are the sole judges of the facts in this case, and you must determine what the facts are from the evidence and the circumstances which have been developed and detailed by the witnesses here. And if you are convinced from the evidence beyond every reasonable doubt that the defendant did sell this liquor, as charged in Count I in this indictment, then you will return a verdict of guilty. If you have a reasonable doubt in your mind as to whether he did sell it or not, then that doubt will be resolved in favor of the defendant, and a verdict of not guilty be returned. And the same may be said with relation to Count III.

Now on Count II, evidence has been presented here of the fact that the defendant was charged in this court heretofore with the sale of intoxicating liquor, and pleaded guilty, and a judgment [43] was entered upon that charge and plea. And if you find that this defendant is the same defendant that was charged in that case, and find that he did sell, or is guilty of Count I in this indictment, then

you will find him guilty likewise of Count II in the indictment.

Now you cannot find the defendant guilty in this case for sale because he has been convicted before; nor can you, in determining his guilt or innocence upon Count I take into consideration the fact that he pleaded guilty, or was convicted before of the sale of intoxicating liquor; that former conviction, or former case, only becomes material if you are convinced by the evidence established from the testimony with relation to that former conviction, that he did sell, as charged in Count I here.

Now with relation to Count III in this indictment, the witnesses on the part of the Government said they found,—you will conclude the fact from the evidence, I am merely referring in this fashion, to call to your mind the incident, not with a view of concluding what the fact is,—but the witnesses on the part of the Government have, in substance, testified that they found under the bar, I think they called it, in the place of business of the defendant some five or six bottles that contained some liquor, which they poured out of the several bottles into one bottle, and it is presented in evidence here. The defendant says that he found these bottles back of his place of business, and he told you that he had bought the place a short time before, and that some parties camped back of his premises, and after they left that he picked up these bottles and brought them in, and was going to wash them out and sell them to the junk man. If you believe or if there is a reasonable doubt in your mind with relation to

the fact that the defendant got those bottles in that fashion,—if he picked them up and brought the bottles in there, and they were merely dregs in the bottles, and not there for any other purpose, why then [44] I hardly think you could find him guilty upon Count III and if you find that to be the fact, or if the evidence raises a reasonable doubt in your mind with relation to that, whey then you will return a verdict of not guilty as to Count III. If, on the other hand, you believe that the quantity that was in these bottles was simply the part that remained after the others had been disposed of,—while there is no evidence here that anything of that kind occurred, yet all the circumstances would lead you to believe that the defendant was engaged in dispensing liquor there, and that these bottles had simply been used there, which the contents had already been disposed of, with the exception of what was in there, and this was left over in the ordinary routine of business there, then you would have a right to conclude, if you believe beyond a reasonable doubt that would be the fact, that the contents of these bottles were not merely dregs remaining in the bottles which had been picked up, but was simply the content that remained after the other had been taken out.

On the first count you will remember the evidence on the part of the witnesses for the Government, and likewise on the part of the defendant. As you have been heretofore instructed, you are the sole judges of the facts in this case. You are likewise the sole judges of the credibility of the witnesses

who have testified before you. Now in determining the weight or the credit you desire to attach to the testimony of any witness you will take into consideration all the circumstances surrounding the parties who have testified implicating the defendant; the reasonableness of the story of the several witnesses; the opportunity of the witnesses for knowing the things about which they have testified, and the interest or lack of interest in the result of this trial, and from all these determine where the truth is. What was the reasonable conduct of all of the parties; how did this Indian happen to go over to the place where they say the liquor was bought; what was the motive that inspired him to go there. [45] Then what was done, so far as the testimony discloses, after he got there,—what transpired, and just what did take place. Then the reasonableness of the conclusion with relation to the disclosures which have been made. There is evidence here that the Indian was in jail at Sumner, being placed in there for intoxication, and he told the witnesses upon the part of the Government where he got the liquor that made him intoxicated. I did not permit him to tell you or me where he got it, that would not have been proper. I think he did testify afterwards where he did get it, but I ask you not to consider his answer, and ask you now not to consider the answer that he gave as to the place where he got it; that is the name of the person from whom he got it; but you have a right to consider, if you did believe the officers of the Government, where he got it. Now then what did the

parties do when Mr. Lambert and the other parties offered by the Government took the Indian and went up to the place of business of the defendant; that they gave the Indian $5.00 when they left Sumner, and asked him to go in; and then the Indian took the money; they marked it; they say they examined him; the Indian says they did not examine him; one of the other witnesses said they did not examine him. Lambert rode with him in the car from Sumner to the place of business of the defendant. He went in there and the officers were out in the automobile about one hundred feet away; they saw him go in, and they saw him come out. He came out with a bottle of whiskey, or liquor, and returned $3.00; $2.00 is what he testifies he paid for the liquor. The defendant says that he did not come in; that he bought some cigarettes for fifteen cents, and gave him a $5.00 bill and he gave him $4.85 back in change; the Indian said he did buy cigarettes and paid him fifteen cents. The Indian, I believe it is conceded, testified, and I don't know that it is denied, had $1.40. The contention of the defendant is that he did not sell this liquor, to him; that the Indian [46] either had it when he drove out from Sumner, or that he got it somewhere other than the defendant's place. The defendant says, if I remember the testimony correctly, that the Indian, after he bought the cigarettes, or before, went into the lavatory before he returned to the automobile.

Now what is the logical and the reasonable conclusion to be drawn from all this testimony?

Would the agent of the Government, under the circumstances disclosed here, give the Indian $5.00 and send him into this place to see whether this defendant was violating the National Prohibition law, and not satisfy himself before he went in that he did not have any liquor on his person, at least a bottle such as is in evidence here? Is it reasonable to conclude that the Indian had this liquor in his pocket when he got out of the jail in Sumner? Now, if he did not get this at the defendant's place of business under the testimony, then he must have had it in his pocket when he was arrested for drunkenness at Sumner, when he was put in jail, and when he was taken out, and when these officers gave him the $5.00 to go in and see whether this defendant was violating the law. Or did he find it in the defendant's lavatory, and the defendant not know that it was there. If he found it in the lavatory, and the defendant had placed it there then, of course, the defendant would not be guilty of sale. So these are matters you will have to determine as reasonable, fair-minded men.

Now these witnesses who have testified, some of them at least, are officers of the Government, they are in the employ of the Government. It is their sworn duty to ferret out persons who violate this law, and get evidence with relation to it, and present it to the court. Now then, in the presentation of this evidence did they impress you as being fair-minded, reasonable-minded men; was the story which they told fair, or did it impress you as coming from a prejudiced source? Did they deliberately perjure

themselves with relation to the search [47] and sale, or are they honestly mistaken? Determine that.

Now the defendant is interested, because if he is found guilty he must be punished; now then, would he, for the purpose of evading the penalty of the law frame his testimony so as to evade the responsibility which the law fixes, or to place a statement before you, or develop a condition which would raise in your minds a reasonable doubt? You will determine this as twelve fair-minded men, with a view of administering justice as nearly as it may be done, giving the defendant a square deal, and likewise the Government. As I have heretofore told you, the Government does not want this defendant convicted if he is not proven guilty beyond every reasonable doubt, but if he is guilty then he ought to be convicted.

I think in weighing the testimony likewise you will take into consideration the intelligence of the Indian who testified, in so far as that has been developed from the examination here. As to his understanding of the terms, and the language employed in his examination. You observed, perhaps, that some questions had to be placed in very simple language so that he could understand them. To what extent did he understand the language that was employed in his examination, and construe the language employed in harmony with the actual circumstances that are developed to your minds, beyond any question of doubt as to the conduct of the parties, what was actually done, and so far as the direct

and positive testimony discloses, and then conclude what the ultimate fact is. You will conclude this upon the direct and positive testimony, as well as the circumstances which have been developed.

Circumstantial evidence is competent, but the circumstances must be consistent with each other, consistent with the guilt of the defendant, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of his guilt. [48]

A reasonable doubt is just such a doubt as the term implies, a doubt for which you can give a reason. It must not arise from a merciful disposition or a kindly or sympathetic feeling, or a desire to avoid performing a possible disagreeable duty; it must be a substantial doubt such as an honest, sensible and fair-minded person might with reason entertain, consistently with a conscientious desire to ascertain the truth and perform a duty. A juror is satisfied beyond a reasonable doubt if from a fair and candid consideration of the entire evidence he has an abiding conviction of the truth of the charge. It is such a doubt as a man of ordinary prudence, sensibility and decision in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at his conclusion; a doubt which is created by the want of evidence, or it may be by the evidence itself. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the truth of the charge.

Have I covered the case? Are there any exceptions?

Mr. DORE.—I want to note an exception to the instruction where you told the jury there was some testimony in the case that the Indian told the officers where he got the liquor, on the ground there is no such testimony in the record.

The COURT.—My recollection is that the witness was asked whether he told the officers where he got the liquor, and I permitted him to say, "Yes." Now if that is before you you will consider it, and if not you will disregard it. You will determine this case solely upon the evidence which has been presented, not from anything that I have said, but from what the witnesses have said and the circumstances which have been developed here.

The verdict is in the usual form; before the word "guilty" is a blank, in which you will write "is" or "not"; and if [49] you find upon Count I that the defendant is not guilty of Count I, then you will find him not guilty of Count II.

It will take your entire number to agree upon a verdict; and when you have all agreed you will cause it to be signed by your foreman, whom you will elect immediately upon retiring to the jury-room.

You may now retire.

And now, in furtherance of justice, and that right may be done, the said defendant, Pete Chorak, tenders and presents to the Court the foregoing as his bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed

and signed and sealed by the Court and made a part of the record in this case.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 29, 1925.

Acceptance of service of within bill acknowledged this 30 Oct., 1925.

C. T. McKINNEY,
Attorney for Ptff.

Certified as correct.

JEREMIAH NETERER,
U. S. Dist. Judge.

Dec. 1st, 1925.

[Endorsed]: Filed Dec. 1, 1925. [50]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following:

Information.
Plea.
Record of trial and impaneling jury.
Verdict.
Motion in arrest of judgment.
Motion for new trial.

Order denying motion for new trial.
Judgment and sentence.
Petition for writ of error.
Assignments of error.
Order allowing writ of error and fixing amount of bonds.
Appeal and bail bond.
All orders extending time for filing bill of exceptions.
All orders extending time for filing record. [51]
Bill of exceptions.
Writ of error.
Citation.
Defendants' praecipe.

JOHN F. DORE,
F. C. REAGAN,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Oct. 29, 1925. [52]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 52 inclusive, to be a full, true, correct and complete

copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [53]

Clerk's fees (Act of February 11, 1925), for making record, certificate or return, 122 folios at 15¢ $18.30

Certificate of Clerk to transcript of record, with seal .... .50

Total $18.80

I hereby certify that the above cost for preparing and certifying record, amounting to $18.80 has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation in this cause issued.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 9 day of December, 1925.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,

Deputy. [54]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before the Honorable Jeremiah Neterer, one of you, between Pete Chorak, the plaintiff in error, and the United States of America, the defendant in error, a manifest error happened to the prejudice and great damage of the said plaintiff in error, as by his complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United

States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at the said city of San Francisco within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, [55] the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 29 day of September, 1925, and of the Independence of the United States one hundred and forty-ninth.

[Seal] ED. M. LAKIN,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By S. M. H. Cook,

Deputy. [56]

Acceptance of service of the within writ acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,

U. S. Attorney.

[Endorsed]: Filed Sep. 29, 1925. [57]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said Pete Chorak is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington,

Northern Division, this 29th day of September, 1925.

JEREMIAH NETERER,
United States District Judge.

[Seal] ED. M. LAKIN,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

By S. E. Leitch,
Deputy. [58]

Acceptance of service of within citation acknowledged this 29 Sept., 1925.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed Sep. 29, 1925. [59]

[Endorsed]: No. 4841. United States Circuit Court of Appeals for the Ninth Circuit. Pete Chorak, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed April 17, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.